

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RICHARD CHUDACOFF, M.D.,

Plaintiff,

v.

UNIVERSITY MEDICAL CENTER, *et al.*,

Defendants.

2:08-cv-00863-RCJ-GWF

ORDER

BACKGROUND

Plaintiff Richard Chudacoff, M.D. ("Plaintiff" or "Chudacoff") is a physician who was appointed to the position of Assistant Professor with the University of Nevada School of Medicine, and granted staff privileges at the University Medical Center of Southern Nevada ("UMC") in the obstetrics and gynecology department. Chudacoff was granted interim privileges on December 20, 2007, and was granted full staff privileges in the obstetrics and gynecology department on January 15, 2008. (Ellerton Letter dated January 15, 2008, Ex. B (#86-2).)

In May 2008, Defendant John Ellerton, M.D. ("Dr. Ellerton"), Chief of Staff, received a verbal complaint from Defendant Donald Roberts, M.D. ("Dr. Roberts") expressing concerns about surgical complications in Plaintiff's cases. (Ellerton Dep. at 46-47, Ex. 1 (#50-4).) As a result, an investigation was initiated and overseen by Dr. Ellerton. (*Id.* at 67.) On May 13, 2008, Dr. Ellerton received an e-mail from a nurse complaining about Plaintiff's behavior towards the nursing staff. (*Id.* at 54-55.) At a meeting on May 27, 2008, Dr. Ellerton presented the results of his investigation to the Medical Executive Committee ("MEC"). Plaintiff was not

1 notified prior to the May 27, 2008 MEC meeting of the complaints against him or the
2 investigation.

3 On May 27, 2008, the MEC decided to (a) suspend Plaintiff's obstetrical privileges until
4 Plaintiff satisfied certain requirements placed by the MEC; (b) forbid Plaintiff from performing
5 any surgeries unless accompanied by Dr. Spirtos; (c) place Plaintiff on a zero tolerance policy
6 for disruptive behavior; (d) require Plaintiff to engage in a discussion with the Nevada Health
7 Professionals Foundation regarding the necessity of a physical and psychological evaluation;
8 and (e) require Plaintiff to undergo drug testing. (Ellerton Letter dated May 28, 2008, Ex. A
9 (#48-3).) Plaintiff was notified of the MEC's decision by a letter written by Dr. Ellerton. (*Id.*)
10 The May 28, 2008 letter advised Plaintiff that he was entitled to a Fair Hearing pursuant to the
11 Medical Staff Bylaws (the "Bylaws"). (*Id.*)

12 On June 10, 2008, Milton Glick, president of the University of Nevada, sent Plaintiff a
13 letter notifying Plaintiff that his employment with the School of Medicine would be terminated
14 as of July 11, 2008. (Glick Letter dated June 10, 2008, Ex. A (#110-2).) On June 16, 2008,
15 Defendants filed an "Adverse Action Report" with the National Practitioner Data Bank ("NPDB")
16 that stated that Plaintiff's clinical privileges had been suspended for substandard of inadequate
17 care. (NPDB Report, Ex. C (#86-2).) These actions were taken before Plaintiff's Fair Hearing.

18 On September 11, 2008, Plaintiff's Fair Hearing was held. At the Fair Hearing, Plaintiff's
19 counsel was not allowed to call, examine, or cross-examine witnesses or otherwise present
20 the case, pursuant to the Bylaws. (Bylaws IV.C.1.d. Ex. L (#48-5).) Plaintiff presented his
21 case personally. (Sept. 11, 2008 Fair Hearing Transcript (#71-4).) The Fair Hearing
22 Committee found that the preponderance of the evidence indicated "periodic episodes of
23 unprofessional behavior and a pattern of poor collegial interactions especially with certain
24 nursing staff" which created "an uncomfortable and possibly hostile work environment." (Fair
25 Hearing Letter to MEC dated Sep. 12, 2008, Ex. K (#48-5).) The Fair Hearing Committee was
26 also concerned with Plaintiff's "reluctance to accept ultimate responsibility for surgical
27 complications that occurred while he was the supervising attending surgeon operating with
28 residents." (*Id.*) The Fair Hearing Committee noted that there was testimony both for and

1 against Plaintiff for the charges of being disruptive and for the charges of substandard care.
2 (*Id.*) The Fair Hearing Committee found that because there was sufficient testimony and actual
3 adverse outcomes, continued investigation and review of Plaintiff's medical practices was
4 warranted. (*Id.*) However, because the evidence concerning a major safety issue, whether
5 Plaintiff was in fact present during an emergency C-section involving a prolapsed cord, tended
6 to favor his availability, the Fair Hearing Committee recommended that the MEC reverse its
7 decision that Plaintiff's privileges be suspended. (*Id.*) Instead, the Fair Hearing Committee
8 recommended focused peer review for a set number of cases such as a minimum of 200
9 deliveries and 300 gynecological surgeries. (*Id.*) The Fair Hearing Committee agreed with the
10 MEC's requirements that Plaintiff be placed on a zero tolerance policy for disruptive behavior,
11 that Plaintiff discuss the necessity of a physical and psychological evaluation, and that Plaintiff
12 undergo drug testing. (*Id.*)

13 At the October 28, 2008 MEC meeting, the MEC suspended Plaintiff's clinical privileges
14 "pending revocation for material misstatements of fact on your medical staff application for
15 privileges." (Ellerton Letter dated Nov. 7, 2008, Ex. D (#57-4).) Charges concerning the
16 alleged misstatements on the application had come up during the Fair Hearing held on
17 September 11, 2008, but the Fair Hearing Committee ultimately found that it was inappropriate
18 for the Fair Hearing Committee to make a decision on the issue as it had not been addressed
19 by the MEC prior to the Fair Hearing. (Fair Hearing Committee Letter to the MEC dated Sep.
20 12, 2008, Ex. K (48-5).) The MEC sent two letters to Plaintiff on November 7, 2008. The first
21 stated that the MEC accepted the recommendations of the Fair Hearing Committee concerning
22 Plaintiff's privileges. (Ellerton Letter dated Nov. 7, 2008, Ex. D (#57-4).) The second notified
23 Plaintiff of the suspension of his privileges for misstatements of facts on his staff application.
24 (*Id.*)

25 Plaintiff asked the MEC for reconsideration of their decision to suspend his privileges
26 based on material misstatements in his application. (Ex. D (#86-2).) Plaintiff and his counsel
27 attended the MEC meeting held on November 25, 2008, and Plaintiff was notified after that
28 meeting that the MEC denied his request for reconsideration. (Mendelbaum E-mail dated Nov.

1 25, 2008, Ex. F (#57-4).)

2 On December 9, 2008, Plaintiff sent a letter to Dr. Ellerton requesting an appeal.
3 (Chudacoff Letter dated Dec. 9, 2008, Ex. 50 (#432-3).) The appellate review hearing by the
4 Board of Trustees occurred on January 20, 2009. (Board of Trustees Hearing Transcript, Ex.
5 52 (#432-3).) The Board of County Commissioners (“BCC” or “Board”) sat as UMC’s Board
6 of Trustees. Plaintiff’s counsel was allowed to present the case at the hearing conducted by
7 the Board of Trustees. (*Id.*) The Board of Trustees decided to send the matter back to a newly
8 reconstituted committee for a rehearing, and encouraged the parties to engage in settlement
9 discussions. (*Id.* at 113.)

10 On January 22, 2009, Plaintiff sent the Commissioners Reid, Sisolak, Collins, Brown,
11 Weekly, Giunchigliani, and Brager a letter requesting reconsideration of the Board’s decision.
12 (Chudacoff Letter dated Jan. 22, 2009, Ex. 53 (#432-3).) Plaintiff expressed his concerns with
13 the Fair Hearing process, and claimed that the hospital and administration were not
14 participating in any settlement discussions. (*Id.*)

15 Another Fair Hearing was scheduled for March 5, 2009. (Mandelbaum Letter dated
16 Mar. 3, 2009, Ex. 55 (#432-3).) On March 13, 2009, after meetings held on March 5, 8, and
17 12, 2009, the hearing committee recommended administrative restrictions on Plaintiff related
18 to his ability to teach and/or supervise residents. (Christensen Letter dated Mar. 13, 2009, Ex.
19 59 (#432-3).) The hearing committee’s letter outlined the evidence presented at the hearing,
20 which included evidence related to four surgical complications, two instances of poor clinical
21 judgment, disruptive behavior, and witness testimony concerning national complication rates.
22 (*Id.*) The hearing committee also recommended removing or modifying the NPDB entry
23 concerning inadequate skill, and recommended focused review as well as a zero tolerance
24 policy for future disruptive behavior. (*Id.*) At the April 28, 2009 MEC meeting, the MEC
25 accepted the report of the Fair Hearing Committee of March 5, 8, and 12, 2009, and limited
26 Plaintiff’s obstetrical privileges to cases that do not involve resident supervision, required
27 formal training in resident supervision in order to resume resident supervision in obstetrics,
28 required 100% focused review on Plaintiff’s next 100 gynecologic surgical cases, instituted a

1 zero tolerance policy for further disruptive behavior, required continuing medical education
2 about disruptive behavior, appointed an onsite workplace monitor, and decided to remove the
3 NPDB entry concerning substandard of inadequate skill level. (Ellerton Letter dated May 7,
4 2009, Ex. 62 (#432-4).)

5 On July 21, 2009, the Board of Trustees conducted a review of the March 2009 Fair
6 Hearing and subsequent MEC action. (Minutes, Ex. 89 (#432-6).) The Board of Trustees
7 affirmed the MEC's actions on April 28, 2009. (*Id.*)

8 On August 10, 2009, new information was reported to the NPDB reinstating clinical
9 privileges, but noting that the committee agreed that concerns with surgical care and behavior
10 were justified. (NPDB Report, Ex. 92 (#432-6).)

11 On July 2, 2009, the Fair Hearing Committee conducted a hearing on the MEC
12 recommendation to suspend Plaintiff's privileges pending revocation for material
13 misstatements of fact on his application for privileges. (Fair Hearing Committee Letter dated
14 July 16, 2009, Ex. 84 (#432-6).) The Fair Hearing Committee found that while certain
15 misstatements were included in the application which might have led to a denial of staff
16 membership had the misstatements not been made, the suspension of Plaintiff's privileges
17 should be lifted and a formal letter of reprimand should be issued. (*Id.*) The MEC voted to
18 uphold the decision of the Fair Hearing Committee, and Plaintiff's suspension of privileges due
19 to material misstatements on his application for privileges was lifted. (Ballard Letter dated Aug.
20 14, 2009, Ex. 94 (#432-6).) Because the Bylaws provide no appellate review rights for a formal
21 letter of reprimand, Plaintiff was unable to appeal that decision to the Board of Trustees. (*Id.*)

22 23 **B. Procedural Background**

24 On July 2, 2008, Chudacoff filed the original complaint in this case. While the
25 administrative process was ongoing, this Court granted partial summary judgment in favor of
26 Chudacoff (#109), holding that Chudacoff was denied constitutionally sufficient procedural
27 protections before being deprived of a protected property interest. Ultimately, however, we
28 granted summary judgment in favor of Defendants (#229), finding, *inter alia*, that the individual

1 doctor Defendants were not acting under color of state law and thus could not be liable under
2 § 1983. We dismissed the state law claim against UMC and the Board of Trustees of UMC
3 (“the Commissioners”) because we did not elect to exercise supplemental jurisdiction after
4 dismissal of the federal claim. The case was appealed to the Court of Appeals for the Ninth
5 Circuit, and the Ninth Circuit reversed our determination that the individual doctor Defendants
6 John Ellerton (“Ellerton”), Dale Carrison (“Carrison”), Marvin Bernstein (“Bernstein”), and
7 Donald Roberts (“Roberts”), members of the MEC, are not state actors.

8 On August 28, 2009, before we granted summary judgment (#229) in favor of
9 Defendants, Chudacoff filed a second action (“*Chudacoff II*”) in this district against doctors who
10 participated in the second and third administrative hearings held subsequent to the filing of the
11 present action. (2:09-cv-01679-RCJ-RJJ.)

12 On July 6, 2012, the Court granted (#493) Plaintiff leave to file a fifth amended
13 complaint to add additional voting members of the MEC who had not previously been included
14 as defendants to the action. The Court granted leave to amend because Plaintiff claimed that
15 the identities of these parties had been purposefully hidden from Plaintiff. The Court also
16 granted sanctions to Plaintiff for Defendants’ failure to remove the NPDB entry, although the
17 Court found that the failure was due to mistake rather than malice. The sanctions to be
18 granted were fees associated with bringing the Motion for Sanctions (#356), with the possibility
19 of additional sanctions.

20 MOTIONS TO DISMISS (##510, 545)

21 A. Legal Standard

22 Courts engage in a two-step analysis in ruling on a motion to dismiss. *Ashcroft v. Iqbal*,
23 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). First, courts accept
24 only non-conclusory allegations as true. *Iqbal*, 129 S. Ct. at 1949. “Threadbare recitals of the
25 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*
26 (citing *Twombly*, 550 U.S. at 555). Federal Rule of Civil Procedure 8 “demands more than an
27 unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* Federal Rule of Civil
28 Procedure 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more

1 than conclusions.” *Id.* at 1950. The Court must draw all reasonable inferences in favor of the
2 plaintiff. See *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009).

3 After accepting as true all non-conclusory allegations and drawing all reasonable
4 inferences in favor of the plaintiff, the Court must then determine whether the complaint “states
5 a plausible claim for relief.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). “A
6 claim has facial plausibility when the plaintiff pleads factual content that allows the court to
7 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at
8 1949 (citing *Twombly*, 550 U.S. at 556). This plausibility standard “is not akin to a ‘probability
9 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
10 unlawfully.” *Id.* A complaint that “pleads facts that are ‘merely consistent with’ a defendant’s
11 liability...’stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.*
12 (quoting *Twombly*, 550 U.S. at 557).

13 **B. Discussion**

14 On July 6, 2012, Plaintiff filed a Fifth Amended Complaint, four years after the initial
15 complaint was filed on July 2, 2008, adding fifteen (15) doctors that served on the MEC (the
16 “Newly Added Doctor Defendants”) in 2008. Plaintiff was granted leave to add these
17 defendants after filing a motion stating that the identity of these defendants had been hidden
18 and unknown to Plaintiff until this time.

19 The Newly Added Doctor Defendants request that the claims against them be dismissed
20 as untimely. Nevada’s statute of limitations for personal injury claims is two years. Nev. Rev.
21 Stat. § 11.190(4)(e). Section 1983 claims are governed by the forum state’s statute of
22 limitations for personal injury actions. *Knox v. Davis*, 260 F.3d 1009, 1012-13 (9th Cir. 2001).
23 “A claim accrues when the plaintiff knows or has reason to know of the injury which is the
24 basis of the action.” *Id.* at 1013 (quoting *TwoRivers v. Lewis*, 174 F.3d 987, 992 (9th Cir.
25 1999)).

26 Plaintiff claimed, in his request to add the Newly Added Doctor Defendants, that he had
27 only recently become aware of their identities and involvement in the acts which form the basis
28 of this case. Specifically, Plaintiff stated that he attempted to discover the identities of the

1 Newly Added Doctor Defendants in 2008 and 2009, but the information was withheld under the
2 “peer review privilege” which this Court held does not apply. Discovery was reopened, and
3 Plaintiff sought to add the Newly Added Doctor Defendants after receiving the MEC minutes
4 from May 27, 2008. The Court granted leave to add the Newly Added Doctor Defendants
5 because of the alleged late disclosure of their identities.

6 However, contrary to Plaintiff’s assertion, the Newly Added Doctor Defendants claim
7 that Plaintiff knew the identities of the doctors serving on the MEC by 2008. As support for
8 their argument, the Newly Added Doctor Defendants refer to documents provided during
9 discovery. Defendants argue that the names of all of the doctors serving on the MEC were
10 included in the initial disclosures as witnesses by September 9, 2008. (Reply, Ex. A. Initial
11 Disclosures (#521-1).) The Court cannot consider this evidence without converting the motions
12 to dismiss to motions for summary judgment. Some of the evidence provided by Defendants
13 is attached only to the reply briefs, and Plaintiff has not been given an opportunity to respond
14 or to provide counter-evidence of his own. For that reason, the Motions to Dismiss shall be
15 denied with respect to the argument concerning timeliness, but Defendants shall be permitted
16 to file a motion for summary judgment arguing that Plaintiff requested leave to amend to add
17 additional defendants on a false basis. If Defendants show that Plaintiff knew of the identities
18 of the Newly Added Doctor Defendants as members of the MEC as early as 2008, the Court
19 may find that Plaintiff did not exercise reasonable diligence in bringing the claims against the
20 Newly Added Doctor Defendants, and that Plaintiff misled the Court in his request to amend
21 the complaint for the fifth time in 2012 to add defendants who had allegedly hitherto been
22 unknown to Plaintiff. Additional arguments concerning absolute immunity are addressed below
23 in a separate section, but any remaining arguments for dismissal should be contained in the
24 motion for summary judgment to be filed by Newly Added Doctor Defendants if necessary.

25 SUMMARY JUDGMENT LEGAL STANDARD

26 Summary judgment allows courts to avoid unnecessary trials where no material factual
27 dispute exists. *N.W. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir.
28 1994). The court must view the evidence and the inferences arising therefrom in the light most

1 favorable to the nonmoving party, *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996), and
2 should award summary judgment where no genuine issues of material fact remain in dispute
3 and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).
4 Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis
5 for a reasonable jury to find for the nonmoving party. FED. R. CIV. P. 50(a). Where reasonable
6 minds could differ on the material facts at issue, however, summary judgment should not be
7 granted. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 516 U.S.
8 1171(1996).

9 The moving party bears the burden of informing the court of the basis for its motion,
10 together with evidence demonstrating the absence of any genuine issue of material fact.
11 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
12 the party opposing the motion may not rest upon mere allegations or denials in the pleadings,
13 but must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*
14 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Although the parties may submit evidence
15 in an inadmissible form — namely, depositions, admissions, interrogatory answers, and
16 affidavits — only evidence which might be admissible at trial may be considered by a trial court
17 in ruling on a motion for summary judgment. FED. R. CIV. P. 56(c); *Beyene v. Coleman Sec.*
18 *Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

19 In deciding whether to grant summary judgment, a court must take three necessary
20 steps: (1) it must determine whether a fact is material; (2) it must determine whether there
21 exists a genuine issue for the trier of fact, as determined by the documents submitted to the
22 court; and (3) it must consider that evidence in light of the appropriate standard of proof.
23 *Anderson*, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist
24 for trial. *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). “As to
25 materiality, only disputes over facts that might affect the outcome of the suit under the
26 governing law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at
27 248. Disputes over irrelevant or unnecessary facts should not be considered. *Id.* Where there
28 is a complete failure of proof on an essential element of the nonmoving party’s case, all other

1 facts become immaterial, and the moving party is entitled to judgment as a matter of law.
2 *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but
3 rather an integral part of the federal rules as a whole. *Id.*

4 **ABSOLUTE IMMUNITY (##478, 510)**

5 Defendants filed a “Motion for Summary Judgment on All Claims Pursuant to New Ninth
6 Circuit Court of Appeals Opinion” (#478). The Motion (#478) seeks summary judgment on all
7 claims on the basis that Defendants are entitled to absolute immunity. While this motion was
8 filed prior to the filing of the fifth amended complaint, the issue remains central in the case, and
9 the Court shall consider the arguments concerning absolute immunity contained in the Motion
10 (#478) as well as in the Motions to Dismiss (#510, 545).

11 **A. Timeliness**

12 While the deadline for dispositive motions was March 22, 2012, Defendants request
13 leave to submit the Motion (#478) because of the Ninth Circuit Court of Appeal’s ruling in
14 *Buckwalter v. State of Nevada Bd. of Med. Exam’rs*, 678 F.3d 737 (9th Cir. 2012), which was
15 issued on April 26, 2012. Plaintiff argues that *Buckwalter* is merely an extension of *Mishler v.*
16 *Clift*, 191 F.3d 998, 1007 (9th Cir. 1999), and therefore cannot serve as the basis for an
17 untimely motion for summary judgment. In *Buckwalter*, the Ninth Circuit extended absolute
18 immunity to a board of medical examiners that summarily suspended a physician’s medical
19 license, whereas in *Mishler*, the Ninth Circuit dealt with a disciplinary hearing rather than a
20 summary suspension.

21 Arguably, the proceedings in which Plaintiff’s privileges were suspended are more like
22 that in *Buckwalter* rather than *Mishler*. For that reason, we find that extending the deadline for
23 dispositive motions is not unreasonable, and shall consider this motion on its merits. In
24 addition, an amended complaint has since been filed, and the Newly Added Doctor
25 Defendants’ Motion to Dismiss (#510) also requests dismissal on the basis of absolute
26 immunity.

27 **B. The Availability of Absolute Immunity to Defendants**

28 Plaintiff argues that absolute immunity is not available to Defendants because

1 *Buckwalter* and *Mishler* involved a branch of the executive government, “where the instant
 2 case involves private actors who expressly disavowed any relationship to the executive
 3 branch.” (Pl’s Opp. at 15 (#479).) While Defendants did argue that they are not state actors
 4 and did not seek absolute immunity, Plaintiff appealed our decision finding that Defendants are
 5 not state actors. The Ninth Circuit found that Defendants, although private physicians not
 6 employed by the county hospital, were state actors because their authority to deprive Plaintiff
 7 of his staff privileges “flows directly from the UMC, whose authority to regulate physician
 8 privileges at a county hospital is in turn directly authorized by Nevada law.” *Chudacoff v. Univ.*
 9 *Med. Ctr. of Southern Nevada*, 649 F.3d 1143, 1150 (9th Cir. 2011). The Ninth Circuit found
 10 that the actions of Defendants “as governing members of the Medical Staff are therefore fairly
 11 attributable to the state, and they cannot now escape liability for their direct and personal
 12 participation in Chudacoff’s unlawful suspension of staff privileges by claiming private conduct.”
 13 *Id.* at 1150-51.

14 Absolute immunity attaches when:

15 State and federal executive officials . . . perform “‘special functions’ which,
 16 because of their similarity to functions that would have been immune when
 Congress enacted § 1983, deserve absolute protection from damages
 liability.”

17 *Buckwalter*, 678 F.3d at 740 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69 (1993)).
 18 “It is the ‘nature of the function performed, not the identity of the actor who performed it,’ that
 19 determines whether an official is cloaked by absolute immunity.” *Id.* Absolute immunity is
 20 accorded to officials of government agencies performing functions analogous to those of a
 21 prosecutor or a judge. *Id.*

22 Cases granting absolute immunity generally involve members of the executive branch.
 23 However, in light of the Ninth Circuit’s ruling that the defendants in our case acted as state
 24 actors and may therefore be liable under § 1983, we find that Defendants may also be eligible
 25 for absolute immunity from such suits if other factors for absolute immunity are met. While the
 26 safeguards typically available in cases involving the state board of medical examiners, such
 27 as the Nevada Administrative Procedures Act, do not apply, there are other possibly equivalent
 28 safeguards built into the actions of our defendants, and we see no reason to artificially

1 distinguish our defendants from state actors when evaluating their right to quasi-judicial
2 immunity, while subjecting them to liability under section 1983 as state actors.

3 **C. The Butz Factors**

4 In *Mishler v. Clift*, the Ninth Circuit held that six nonexclusive factors should be analyzed
5 in deciding whether absolute immunity should be granted. *Mishler*, 191 F.3d 998, 1003 (9th
6 Cir. 1999). Those factors, originally articulated in *Butz v. Economou*, 438 U.S. 478, 512-13
7 (1978), include:

8 (a) the need to assure that the individual can perform his functions without
9 harassment or intimidation; (b) the presence of safeguards that reduce the
10 need for private damages actions as a means of controlling unconstitutional
conduct; (c) insulation from political influence; (d) the importance of
precedent; (e) the adversary nature of the process; and (f) the correctability
of error on appeal.

11 *Mishler*, 191 F.3d at 1003; see also *Buckwalter*, 678 F.3d at 740. The Ninth Circuit found that
12 the board members of the Nevada Board of Medical Examiners are entitled to absolute
13 immunity for acts occurring during the disciplinary hearing process: holding hearings, taking
14 evidence, and adjudicating. *Mishler*, 191 F.3d at 1008. In the more recent case, *Buckwalter*,
15 the Ninth Circuit extended absolute immunity to board members of the Nevada Board of
16 Medical Examiners for the summary suspension of a physician's medical license in a
17 nonadversarial and ex parte proceeding without notice or an opportunity to be heard. 678 F.3d
18 at 742. The Court specifically noted that such proceedings are "not subject to the various
19 procedural strictures that govern formal disciplinary hearings" and still accorded absolute
20 immunity to the board members. *Id.*

21 The *Buckwalter* court extended *Mishler* to summary suspension proceedings in part
22 because "state law provides that whenever the Board Members exercise their summary
23 suspension power, a formal hearing ineluctably follows." *Id.* at 743. While the summary
24 suspension proceeding itself lacked the safeguards of notice or opportunity to be heard, it is
25 accompanied by the following administrative hearing "with a full complement of procedural
26 safeguards." *Id.* As Plaintiff points out, the Nevada Administrative Procedure Act does not
27 govern the appeals process in our case; however, the Board is governed by the Bylaws, which
28 provide for extensive appellate review, including notice and an opportunity to be heard,

1 following a decision or recommendation of the MEC.

2 Before, however, we consider the six *Butz* factors in greater detail, we considered
3 whether Defendants' actions in this case are more analogous to the summary suspension in
4 *Buckwalter*, or should be considered a routine administrative action, which Plaintiff argues
5 would defeat absolute immunity. Defendants argue that regardless of what label is placed on
6 the actions, the facts of this case are identical to those found in *Buckwalter*, because the
7 MEC's decision to suspend Plaintiff's privileges without notice or opportunity to be heard was
8 based on their decision that he was a threat to the safety of patients. Previously, at a
9 deposition, Dr. Ellerton testified that the MEC's actions were not undertaken pursuant to their
10 summary suspension power, but amounted to a routine administrative action, testimony that
11 was repeated in one of our previous Orders, and also quoted by the Ninth Circuit. The Bylaws
12 separate an emergency summary suspension power from routine administrative actions by
13 giving the summary suspension power to the Chief of Staff. Such a suspension is not to
14 exceed thirty (30) days or until the next MEC meeting. The MEC, on the other hand, may
15 recommend suspending a physician's privileges as part of a routine administrative action after
16 an investigation.

17 We agree with Defendants that regardless of what label is placed on the summary
18 suspension, the facts of this case are more similar to the facts of *Buckwalter* than the facts of
19 *Mishler*. As in *Buckwalter*, the MEC suspended Plaintiff's privileges after receiving complaints
20 about Plaintiff's quality of care. The suspension was decided upon by the MEC after a
21 preliminary investigation. The MEC decided to suspend Plaintiff's privileges at a hearing held
22 on May 27, 2008, without giving Plaintiff notice or an opportunity to be heard. Plaintiff received
23 a letter the day after the MEC hearing, and was informed that he was entitled to a Fair Hearing
24 regarding the MEC decision. The letter informed Plaintiff that the limitation of his privileges
25 were taken as a result of concern for patient safety, as four of Plaintiff's cases had surgical
26 complications in an approximate four-month time period. In essence, at least, what occurred
27 was a summary suspension very much like the one described in *Buckwalter*, which the Ninth
28 Circuit described as a procedure in which the plaintiff "received no notice of the emergency ex

1 parte telephone conference . . . [and] had no opportunity to contest the charge that he was a
2 danger to the public” before his privileges were suspended, with only a post-deprivation
3 hearing set four months after the summary suspension. *Buckwalter*, 678 F.3d at 742.

4 Whether the MEC’s decision is characterized as summary suspension or routine
5 administrative action, there were procedural defects. It is clear that the MEC decision was not
6 a summary suspension as defined in the Bylaws, because it proceeded after an investigation
7 and an MEC meeting as provided for under the procedure for routine administrative actions
8 rather than through emergency unilateral action by the Chief of Staff. In addition, under the
9 Bylaws, a summary suspension is not to exceed thirty (30) days. A summary suspension as
10 defined in the Bylaws would not have qualified Dr. Ellerton for absolute immunity under
11 *Buckwalter* because the process is more akin to the summary suspension power for which the
12 Second Circuit rejected absolute immunity. See *Buckwalter*, 678 F.3d at 745; *DiBlasio v.*
13 *Novello*, 344 F.3d 292, 299 (2d. Cir 2003). The Ninth Circuit noted that the New York statutory
14 scheme governing summary suspensions gives “virtually unfettered” power to the
15 Commissioner of the State Department of Health to unilaterally suspend a physician’s license
16 following an investigation by the State Board of Professional Medical Conduct. *Buckwalter*,
17 678 F.3d at 745. What actually occurred in our case, the summary suspension of Plaintiff’s
18 privileges without notice or an opportunity to be heard, after a preliminary investigation and a
19 hearing at which evidence was presented to the members, deliberated over, and voted upon,
20 is similar to what occurred in *Buckwalter*. Dr. Ellerton did not exercise his summary
21 suspension powers under the Bylaws unilaterally.

22 When the MEC engages in routine administrative actions against a physician whose
23 conduct may be detrimental to patient safety or to the delivery of quality patient care, the MEC
24 is governed by the procedure provided in the Credentialing Procedures Manual, Article VI.
25 (Credentialing Procedures Manual, Ex. 5 at 27 (#432-1).) The Credentialing Procedures
26 Manual provides that the MEC may conduct an investigation concerning requests for
27 administrative action, and that the MEC may recommend suspension of a physician’s
28 privileges as a result of such investigation. An MEC recommendation for decreased privileges

1 entitles a physician to the procedural rights contained in the Fair Hearing Plan. While the MEC
2 suspended Plaintiff's privileges without notice or an opportunity to be heard, that action must
3 have been carried out under the routine administrative action authority of the MEC, and the
4 Court shall consider the routine administrative action procedure provided in the Bylaws and
5 the Credentialing Procedures Manual to decide the issue of absolute immunity.

6 We previously determined that Defendants violated Plaintiff's constitutional rights in
7 failing to provide notice and an opportunity to be heard before limiting his privileges. That
8 decision is not fatal to a determination that Defendants are nevertheless entitled to absolute
9 immunity. Defendants are immune from suits concerning procedural errors, even constitutional
10 errors, if absolute immunity applies. See, e.g., *Guzman-Rivera v. Lucena-Zabala*, 642 F.3d 92,
11 98-99 (1st Cir. 2011). In *Guzman-Rivera*, the First Circuit held that the defendants are entitled
12 to absolute immunity despite the "grave and unacceptable" procedural error involved in the
13 summary suspension of the plaintiff's license. *Id.* "A judge is absolutely immune from liability
14 for his judicial acts even if his exercise of authority is flawed by the commission of grave
15 procedural errors." *Id.* at 99 (quoting *Stump v. Sparkman*, 435 U.S. 349, 359 (1978)). In
16 *Mishler*, the plaintiff argued that the actual practice of the board and its construction of the
17 rules must be considered in determining whether adequate procedural safeguards exist rather
18 than the Nevada statutes governing the disciplinary process. *Mishler*, 191 F.3d at 1006.
19 However, the Ninth Circuit found that "[t]he acts of the Nevada Board are no less judicial or
20 prosecutorial because they may have been committed in error." *Id.* "It is the available
21 procedures, not the manner in which they are exercised in a particular case, that is the critical
22 inquiry for determining whether there are safeguards that reduce the need for private damages
23 actions." *Id.* Therefore, we believe that Defendants are entitled to an examination of whether
24 absolute immunity applies despite any procedural errors that may have occurred.

25 Furthermore, notice and an opportunity to be heard are not required prior to
26 investigating a complaint. In *Mishler*, the Ninth Circuit noted that the Nevada Administrative
27 Procedure Act provides adequate safeguards to physicians when notice and an opportunity
28 to be heard at a formal hearing are given to a physician after the Nevada Board investigates

1 and decides to proceed with disciplinary action. *Mishler*, 191 F.3d at 1006 n.6. UMC's Fair
2 Hearing Plan similarly grants procedural safeguards of notice and an opportunity to be heard
3 once an adverse recommendation or action is taken pursuant to the Bylaws and the MEC's
4 power to conduct routine administrative action. (Fair Hearing Plan, Ex. 3 at 3 (#432-1).) For
5 that reason, the Bylaws may be sufficiently protective of a physician's rights, even if the MEC
6 acted in error by converting a recommendation to suspend privileges into immediate action
7 before Plaintiff was given an opportunity to contest the charges.

8 Even if the MEC erred procedurally, absolute immunity is still available to Defendants
9 if they had jurisdiction over the subject matter. See *id.* (quoting *Stump*, 435 U.S. at 356). The
10 MEC may, as part of a routine administrative action, investigate complaints and issue
11 recommendations limiting physician privileges. In our case, the MEC's recommendation was
12 put immediately into effect, and a fair hearing followed. Arguably, the MEC may not have had
13 the authority to limit Plaintiff's privileges when it did, but the Bylaws do not address when an
14 MEC recommendation becomes a decision, or how. During a deposition, Dr. Ellerton
15 represented that the understanding is that the MEC's recommendation is tantamount to a
16 decision. While we are not sure that is the intent of the Bylaws, the Bylaws are unclear on the
17 matter. It may be that the MEC recommends and the Chief of Staff converts the
18 recommendation into action. Regardless, in this case, the MEC voted to suspend Plaintiff's
19 privileges, and the suspension was put into effect immediately, and Plaintiff was given notice
20 and an opportunity to be heard in accordance with the Fair Hearing Plan.

21 In analyzing the *Butz* factors, we relied primarily on *Buckwalter*, *Mishler*, and *Moore v.*
22 *Gunnison Valley Hospital*, 310 F.3d 1315 (10th Cir. 2002). *Moore* examines the summary
23 suspension power of a public hospital's peer review committee. 310 F.3d at 1316. The Tenth
24 Circuit denied members of the committee absolute immunity because it found that only the first
25 *Butz* factor, the need to assure that the individual can perform his functions without
26 harassment or intimidation, favors absolute immunity. *Id.* at 1317.

27 1. Need to Ensure Performance of Functions Without Harassment.

28 This factor clearly favors absolute immunity. The MEC has the authority to recommend

1 or possibly take action to limit a practitioner's privileges as a disciplinary measure. There is
 2 a "strong need" to ensure that such disciplinary functions can be carried out without the threat
 3 of harassment or intimidation "[i]n view of the public interest of ensuring quality health care."
 4 *Mishler*, 191 F.3d at 1005. That need becomes more acute under emergency summary
 5 suspension circumstances. In *Buckwalter*, the Ninth Circuit noted that the board members'
 6 "interest in performing their functions free from harassment is at its apex when a physician
 7 poses a serious threat to public safety." *Buckwalter*, 678 F.3d at 743.

8 2. Safeguards that Reduce the Need for Private Damages Actions.

9 While Defendants are treated as state actors for the purposes of a § 1983 suit, they are
 10 not required to provide identical procedural safeguards as the Nevada State Board of Medical
 11 Examiners. In *Mishler* and in *Buckwalter*, the state board is governed by Nevada statutes and
 12 the Nevada Administrative Procedure Act, whereas Defendants here were governed by UMC's
 13 Bylaws. See *Mishler*, 191 F.3d at 1005-06; *Buckwalter*, 678 F.3d at 743.

14 The Nevada procedure for disciplinary hearings as it existed at the time of *Mishler* is
 15 described in detail by the Ninth Circuit. *Mishler*, 191 F.3d at 1005, n. 6. After the Nevada
 16 Board receives a complaint, an investigative committee reviews and investigates the complaint,
 17 and presents its evaluation and recommendation to the state board, which decides whether
 18 further action should be taken. NEV. REV. STAT. §§ 630.11, 233B.122; *Mishler*, 191 F.3d at
 19 1005, n.6. If the board decides to proceed with disciplinary action, it must bring charges
 20 against the physician and set a formal hearing. NEV. REV. STAT. § 630.339; *Mishler*, 191 F.3d
 21 at 1005, n.6. The physician must receive notice of the charges, the hearing, and potential
 22 sanctions. NEV. REV. STAT. § 630.339; *Mishler*, 191 F.3d at 1005, n. 6. The physician is
 23 entitled to representation by counsel and can present evidence. NEV. REV. STAT. § 233B.121;
 24 *Mishler*, 191 F.3d at 1005, n. 6. If by clear and convincing evidence, the board determines that
 25 a violation of the regulations has occurred, it issues a written order containing findings and
 26 sanctions. NEV. REV. STAT. § 233B.121; *Mishler*, 191 F.3d at 1005, n. 6. Any person aggrieved
 27 by a final order of the board is entitled to judicial review in district court. NEV. REV. STAT. §
 28 630.356; *Mishler*, 191 F.3d at 1005, n. 6.

1 In contrast, the emergency summary suspension process examined in *Buckwalter* is
2 nonadversarial, often ex parte, employs an indeterminate burden of proof, and is “not subject
3 to the various procedural strictures that govern formal disciplinary hearings.” *Buckwalter*, 678
4 F.3d at 742. The Board is required to institute a formal hearing after a summary suspension.
5 *Id.* Current Nevada law requires a hearing within 45 days of the entry of a summary
6 suspension order, but at the time of *Buckwalter*, the only requirement was that the hearing be
7 “promptly instituted.” *Id.*

8 In spite of the “parsimony of the procedural safeguards built into the summary
9 suspension procedure,” the Ninth Circuit found that the summary suspension power is
10 analogous to a judicial function. *Id.* The Ninth Circuit observed that once the board members
11 exercise their summary suspension power, “a formal hearing ineluctably follows.” *Id.* at 743.
12 “The Board Members’ temporary emergency judgment is thus necessarily tested in the crucible
13 of an administrative hearing with a full complement of procedural safeguards.” *Id.* The Ninth
14 Circuit found that the post-deprivation hearing would suffice for a physician to “receive[]
15 precisely the due process that the physician in *Mishler* did.” *Id.* In contrast, the Tenth Circuit
16 found that post-deprivation procedures may be inadequate to satisfy the second *Butz* factor.
17 The Tenth Circuit rejected the peer review committee’s argument that summary suspension
18 is a temporary action reserved for emergency situations which only become permanent
19 following more substantive proceedings, stating that “because Appellee has alleged damages
20 from both his temporary suspension and the admonitions, Appellants must show the necessity
21 for this abbreviated emergency process” and have failed to identify those circumstances.
22 *Moore*, 310 F.3d at 1317-18.

23 The procedural safeguards under UMC’s Bylaws are not identical to those found in
24 Nevada law and applicable to the State Board of Medical Examiners. Nevertheless, if the
25 Bylaws provided similar protection for a physician, the MEC may be eligible for absolute
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27
28

1 immunity.¹ Under the Bylaws, the Chief of Staff or his designated representative may
2 summarily suspend the privileges or membership status of a practitioner for a period not to
3 exceed thirty days or until the next regularly scheduled MEC meeting when such action is
4 required “to protect the life of any patient(s) or to reduce the substantial likelihood of injury or
5 damage to the health or safety of any patient, employee, or other person present in the
6 hospital.” (Bylaws, Ex. 4 at 38 (#432-1).) The practitioner must be given prompt special notice
7 and the MEC may recommend modifications, continuation or termination of the terms of the
8 suspension at its meeting to follow. (*Id.*) The practitioner is also entitled to the procedural
9 rights of the Fair Hearing Plan, discussed below. (*Id.*)

10 A routine administrative action is accompanied by additional procedural safeguards for
11 a practitioner. When a physician acts unprofessionally in a way that is or is likely to be
12 detrimental to patient safety or to the delivery of quality patient care, administrative action may
13 be taken by the chief of any department or any member of the Medical and Dental Staff, or by
14 the Chief of Staff. (Bylaws, Ex. 4 at 38 (#432-1).) A written request for administrative action
15 must be submitted to the MEC, and after deliberation, the MEC may act on the request or
16 direct that investigation be undertaken. (Credentialing Procedures Manual, Ex. 5 at 27 (#432-
17 1).) Within sixty days after receipt of the request for administrative action, and as soon as
18 practicable after conclusion of the investigative process, if any, the MEC may act by
19 recommending rejection of the request for action, recommending a warning or formal letter of
20 reprimand, recommending a probationary period, recommending suspension of membership
21 prerogatives or reduction, suspension, revocation of clinical privileges, and other such acts.
22 (*Id.* at 27-28.) An MEC recommendation for individual consultation, decreased privileges,
23 reduced category, diminished or suspended patient care prerogatives, or suspended or
24 revoked membership is deemed adverse and entitles the practitioner to the procedural rights
25 contained in the Fair Hearing Plan. (*Id.* at 28.)

26
27 ¹ We note, however, that the Bylaws allow appellate review only in the case of an
28 adverse action, and the issuance of a reprimand letter is not considered an adverse action.
(Bylaws, Ex. 4 at 40 (#432-1).) In *Moore*, the Tenth Circuit found that the lack of appealability
for a reprimand letter fails the sixth *Butz* factor.

1 Under the Fair Hearing Plan, if a physician requests a fair hearing within thirty days of
2 an adverse recommendation or action, the Chief of Staff will appoint an ad hoc hearing
3 committee composed of five members of the active Medical and Dental Staff, none of whom
4 are members of the MEC, and if possible, none of whom are in “direct economic competition”
5 with the practitioner. (Fair Hearing Plan, Ex. 6 at 4 (#432-1).) The practitioner is entitled to a
6 copy of all medical records or documents to be presented at the hearing, a written report from
7 each expert setting forth the substance of the expert’s testimony, and copies of all materials
8 provided by UMC for review by each expert. (*Id.* at 4-5.) Both sides may call and examine
9 witnesses, introduce exhibits, cross-examine witnesses, be represented by a licensed attorney,
10 and to submit a written statement at the close of the hearing. (*Id.* at 6.) However, a licensed
11 attorney may not call, examine, or cross-examine witnesses or otherwise present the case.
12 (*Id.*) The burden of proof is on the MEC, and the practitioner may support his contention that
13 the adverse action lacks a basis by a preponderance of the evidence. (*Id.*) After the fair
14 hearing, the committee makes a written report of its findings and forwards the report to the
15 MEC or the body whose adverse action occasioned the hearing. (*Id.* at 7.) While the MEC is
16 not bound to the findings of the fair hearing committee, it must review, consider, and affirm,
17 modify, or reverse its original action at the next meeting. (*Id.*) The practitioner is entitled to
18 a second appellate procedure entitled “Appellate Review” if the result is unsatisfactory after
19 the fair hearing. (*Id.* at 8.) After a request for appellate review, the Board of Trustees shall
20 schedule and arrange for an appellate review not less than thirty days nor more than sixty days
21 from the date of the request, “provided, however, that an appellate review for a Practitioner
22 who is under a suspension then in effect shall be held as soon as the arrangements for it may
23 be reasonably made.” (*Id.* at 7-8.) The Board of Trustees’ decision is final. (*Id.* at 10.)

24 In our view, the Bylaws set out a process similar enough to the ones set forth in *Mishler*
25 and *Buckwalter* for purposes of absolute immunity. While it is true that the actual acts of the
26 MEC in our case do not fall clearly under either summary suspension or routine administrative
27 action, it is the Bylaws that govern the MEC, rather than the actual practice of the MEC and
28 its construction of the rules that we must consider in determining whether adequate procedural

1 safeguards exist. See *Mishler*, 191 F.3d at 1006. “It is the available procedures, not the
 2 manner in which they are exercised in a particular case, that is the critical inquiry for
 3 determining whether there are safeguards that reduce the need for private damages actions.”
 4 *Id.* The MEC investigated complaints based on patient safety, and provided Plaintiff with notice
 5 and an opportunity to be heard once disciplinary action was recommended, and the availability
 6 of the procedural safeguards found under the Fair Hearing Plan favors granting absolute
 7 immunity.²

8 3. Insulation from Political Influence

9 The Tenth Circuit in *Moore* found that peer review committees are more susceptible to
 10 political influence because the members work at the same hospital as the physician
 11 challenging their decisions and are his competitors in a small medical community. *Moore*, 310
 12 F.3d at 1318. The Ninth Circuit held that the State Board of Medical Examiners, while not as
 13 independent as the federal administrative hearing officers in *Butz*, are “sufficiently insulated
 14 from political influence.” *Mishler*, 191 F.3d at 1007. The Nevada Board members who
 15 participate in the disciplinary hearings work with the members who lodged the charge, and
 16 therefore there is not as much separation of the investigatory, prosecutorial and judging
 17 functions as there would be when separate state agencies perform separate functions. *Id.* at
 18 1006. Six of the nine board members are doctors who practice medicine in Nevada, and this
 19 “raises the specter that board members may achieve personal financial gain by revoking the

20
 21 ² The summary suspension power under the Bylaws, however, does not pass muster
 22 under *Buckwalter*. The Chief of Staff has the unilateral authority to summarily suspend
 23 privileges. In *DiBlasio v. Novello*, the Second Circuit denied absolute immunity to employees
 24 of the New York State Department of Health who summarily suspended a physician’s license.
 25 *DiBlasio v. Novello*, 344 F.3d 292, 300 (2d Cir. 2003). The Ninth Circuit distinguished *DiBlasio*
 26 because under the statutory scheme at issue in that case, an “autarchic commissioner-figure
 27 may impose summary suspensions by fiat,” and the commissioner was not required to adopt
 28 the hearing committee’s recommendations, thereby rendering prompt post-deprivation
 hearings “hollow.” *Buckwalter*, 678 F.3d at 745. The Bylaws provide a process for summary
 suspensions that is more similar to that of *DiBlasio*. However, in this case, the MEC
 proceeded on a routine administrative action basis. The MEC convened and investigated the
 complaint, recommended suspension of Chudacoff’s privileges based on patient safety, and
 the Fair Hearing Plan’s protections of notice and an opportunity to be heard followed promptly.
 Furthermore, we note that in this case, the Fair Hearing Plan provided Plaintiff with review that
 ultimately resulted in the reversal of the suspension of his privileges.

1 licenses of other doctors and presents the strong potential for conflicts of interest.” *Id.* at 1006-
2 07. The Ninth Circuit found that the risk that board members may act out of their self interest
3 is diminished because of the presence of three non-physicians on the Board. *Id.* at 1007.

4 In the case of the MEC, there is likewise the risk of “self interest economic regulation”
5 because the members of the MEC are practicing in the same medical community as Plaintiff.
6 *Id.* at 1007 (quoting *Watts v. Burkhardt*, 978 F.2d 269, 276 (6th Cir. 1992) (en banc)). The MEC
7 is composed of the present Chief of Staff, the past Chief of Staff, the Vice Chief of Staff, the
8 Secretary, the Chief of each department, and four members at-large of the active staff.
9 (Bylaws, Ex. 4 at 36 (#432-1).) Two of the members at-large are elected in even-numbered
10 years and two in odd-numbered years for a term of two years. (*Id.*) All voting members are
11 therefore part of Plaintiff’s medical community, unlike in *Mishler*, where three of the six
12 members were non-physicians. See *Mishler*, 191 F.3d at 1007. The Ninth Circuit notes,
13 however, that in *Watts* the medical board was composed entirely of physicians, and the Sixth
14 Circuit nevertheless found that the risk of self interest economic regulation is not enough to
15 deny absolute immunity. *Id.* (citing *Watts*, 978 F.2d at 276). Compared to a state medical
16 board, the members of the MEC work together in a much smaller community and may be
17 susceptible to a greater risk of being tempted by personal gain when another physician’s
18 medical privileges are suspended. The Sixth Circuit found, however, that professionals in a
19 local community may benefit from “professional courtesy” being at risk if physicians were to
20 make selfish decisions regarding the privileges and licenses of other physicians in their
21 community. *Watts*, 978 F.2d at 276-77. This factor leans against granting absolute immunity
22 because of the possibility of decisions motivated by self interest. The addition of non-
23 physicians or outside physicians to the MEC, or a more independent fair hearing committee,
24 may alleviate the problems of political influence. However, we do not think that this factor,
25 taken alone, is fatal to the question of absolute immunity.³ The risk of self interest exists, but

26
27 ³ The finding that an official is not insulated from political influence is not by itself fatal
28 to finding absolute immunity. See, e.g., *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008).
In *Miller*, the Ninth Circuit found that the governor is entitled to absolute immunity when
reviewing parole decisions, despite being “by definition as an elected official, not insulated from

1 we cannot ignore the public interest and benefit in protecting those who report, investigate, and
 2 adjudicate conduct that may be harmful to patients and other employees at a hospital simply
 3 because the physicians who are in a position to report and investigate such conduct work in
 4 the same field and thus may be potential competitors. Finally, the Fair Hearing Plan allows a
 5 physician to appeal to the Board of Hospital Trustees as a final appellate measure, and the
 6 members of the Board of Trustees are not required to be physicians in competition with the
 7 Plaintiff. For that reason, we find that this factor does not require denial of absolute immunity.

8 4. Precedent

9 This factor “points in neither direction,” because it is unclear whether the MEC relies on
 10 precedent when they exercise their authority. *Buckwalter*, 678 F.3d at 744.

11 5. Adversariness

12 In *Moore*, the Tenth Circuit found that this factor is strictly against absolute immunity
 13 because the summary suspension process is completely non-adversarial. 310 F.3d at 1318.
 14 The existence of adversarial post-deprivation hearings was insufficient because the physician
 15 was “adversely affected by the summary suspension” and because, as in our case, no process
 16 is available following the issuance of written admonitions. *Id.* The Ninth Circuit, however,
 17 found that “[s]ummary suspensions are effectively adversary because they are subject to
 18 mandatory postdeprivation review.” *Buckwalter*, 678 F.3d at 743. Furthermore, the Ninth
 19 Circuit found that routine disciplinary actions are adversary in nature because a physician is
 20 granted notice and an opportunity to be heard once the Nevada Board decides to proceed with
 21 disciplinary action. *Mishler*, 191 F.3d at 1007. In our case, the Bylaws provide that a summary
 22 suspension is effective for only thirty days or until the next regularly scheduled MEC meeting,
 23 and a practitioner is entitled to the rights contained in the Fair Hearing Plan. (Bylaws, Ex. 4
 24 at 37 (#432-1).) Routine administrative actions similarly provide a physician with notice and

25
 26 political influence.” *Id.* The Ninth Circuit even noted that those decisions themselves “amply
 27 demonstrate” that the governor is influenced by politics, because of his “almost uniform denials
 28 of parole.” *Id.* In our case, as we noted, there are alleviating factors such as extensive
 procedural safeguards built into the review process, and the pressure of professional courtesy
 which likely curtails selfish behavior.

1 an opportunity to be heard once the MEC has conducted its investigation and recommended
2 a disciplinary action.⁴ For that reason, we find that the Bylaws provide for an adversarial
3 process in the case of both summary suspensions and routine administrative actions.

4 6. Correctability

5 In *Moore*, the Tenth Circuit concludes that because an internal appellate process is
6 unavailable for a letter of admonition, the sixth factor is against absolute immunity. 310 F.3d
7 at 1318. Despite noting that the bylaws “provide a full range of procedural protections” it finds
8 that those protections are insufficient because they are unavailable if a summary suspension
9 has been terminated by the staff. *Id.* It concludes that the right to file a lawsuit is inadequate
10 as a right of appeal because it suggests that the committee should be granted immunity from
11 suit since its procedures do not allow internal appeal but allow the committee to be sued. *Id.*
12 at 1318-19.

13 The Ninth Circuit, on the other hand, disagrees. It found that the last *Butz* factor,
14 correctability of errors on appeal, favors absolute immunity because “an erroneous summary
15 suspension may be corrected in either the postdeprivation hearing or in Nevada state court in
16 a subsequent appeal.” *Buckwalter*, 678 F.3d at 744. We agree, as we must, with the Ninth
17 Circuit. Granting absolute immunity to the MEC against section 1983 suits seeking damages
18 does not mean that a practitioner is denied the right of appeal to overturn an erroneous
19 decision.

20 7. Conclusion

21 Taken as a whole, the *Butz* factors favor granting absolute immunity in this case due
22 to insufficient procedural safeguards in the summary suspension process and disciplinary
23 process. For that reason, the requests that we dismiss the 1983 claims on the basis of
24 absolute immunity must be granted. Plaintiff has not made a showing of bad faith or malice,
25 and all defendants are entitled to absolute immunity for their actions in prosecuting and
26

27 ⁴ While an adversary procedure is not available after the issuance of a reprimand letter,
28 which ultimately occurred in our case after the suspension of privileges was revoked, a
reprimand letter may not require the same procedural safeguards as the actual reduction or
suspension of one's privileges.

1 adjudicating the charges against Plaintiff.

2 **MEDICAL AND DENTAL STAFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON**
 3 **BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (#409)**

4 The Medical and Dental Staff requests summary judgment on Plaintiff's claim for breach
 5 of the implied covenant of good faith and fair dealing. Plaintiff's breach of the implied covenant
 6 of good faith and fair dealing claim is based upon the contract allegedly created as a result of
 7 UMC's Bylaws and Credentialing Manual. The Medical and Dental Staff argues that even if
 8 the Bylaws and Credentialing Manual created a contract between UMC and Plaintiff, the
 9 Medical and Dental Staff is not a party to that alleged contract.

10 Whether a contract exists between the parties is a question of fact. *Whitemaine v.*
 11 *Aniskovich*, 183 P.3d 137, 141 (Nev. 2008). The Bylaws provide that the physicians practicing
 12 at UMC hereby organize themselves into a Medical and Dental Staff in conformity with these
 13 Bylaws, Rules and Regulations, and the Bylaws, policies, rules and regulations of UMC.
 14 (Bylaws at 6, Ex. A (#409).) The Bylaws enumerate the responsibilities, obligations, and
 15 membership qualification requirements for Medical and Dental Staff. (Bylaws, Article II-III, Ex.
 16 A (#409).) Article V delineates the practice privileges of Medical and Dental Staff members,
 17 and Article X provides the purpose, composition, and functions of the MEC. (*Id.*) The Bylaws
 18 also provide that routine administrative actions may be taken for instances of unprofessional
 19 conduct, acts, statements or demeanor likely to be detrimental to patient safety or to the
 20 delivery of quality patient care. (*Id.*) The Bylaws provide that the procedure for routine
 21 administrative actions is contained in the Credentialing Procedures Manual. (*Id.*) The Bylaws
 22 further provide that the Chief of Staff has the authority to summarily suspend clinical privileges
 23 when immediate action must be taken to protect the life of any patients or to reduce the
 24 substantial likelihood of injury or damage to the health or safety of any patient, employee or
 25 other person in the hospital. (Bylaws, Article XI, Ex. A (#409).)

26 On February 21, 2007, Plaintiff signed a Consent and Statement of Applicant form that
 27 provides in part that Plaintiff is "responsible for knowing the contents of the bylaws, rules and
 28 regulations, and any supplemental manuals or policies and procedures UMC and the medical

1 staff [sic] and agree to be bound by them.” (Consent Form, Ex. 1 at 45 (#432-1).)

2 Under Nevada law, an enforceable contract is formed when there is offer, acceptance,
3 meeting of the minds, and consideration. *Mack v. Estate of Mack*, 206 P.3d 98, 108 (Nev.
4 2009). In *Williams v. University Medical Center of Southern Nevada*, this Court predicted that
5 Nevada would find that a hospital’s bylaws can create “an enforceable contract between the
6 hospital and its staff, as well as between the staff and its members.” *Williams v. Univ. Med.*
7 *Ctr. of So. Nevada*, 688 F. Supp. 2d 1134, 1141-42 (D. Nev. 2010). The Court acknowledged
8 that a split in authority exists among other courts which have addressed the issue, but found
9 that a physician makes an offer to become a member of the hospital staff by applying for
10 privileges at the hospital, and the hospital and staff accept the offer by granting the physician
11 privileges. *Id.* at 1142. In doing so, the parties agree that the terms of the bylaws will govern
12 their relationship. *Id.* The Court found that an unincorporated association’s bylaws also
13 constitutes a contract between the members in their relation to the association. *Id.* at 1143.
14 The Court also noted that a reasonable jury may find that a physician is an intended third party
15 beneficiary of the contract between the Chief of Staff and the hospital. *Id.* at 1144. Based on
16 the reasoning in *Williams*, we decline to grant summary judgment on this issue.

17 **UMC AND BOARD OF TRUSTEE’S MOTION FOR SUMMARY JUDGMENT (##414, 417)**

18 UMC and the Board request judgment as a matter of law on Plaintiff’s claim for breach
19 of the implied covenant of good faith and fair dealing on the basis that neither UMC nor the
20 Board participated in any of the events, or committed any of the acts, that Plaintiff has alleged
21 were breaches causing him injury.

22 Plaintiff’s fifth amended complaint (#494) was filed after UMC and the Board filed this
23 motion for summary judgment (#414); however, the fifth amended complaint (#494) includes
24 identical claims. The Court shall consider this motion (#414) as it applies to the current
25 operative complaint without requiring the parties to re-file motions that remain material and
26 relevant despite the filing of the amended complaint.

27 In our Order (#456) granting leave to file a fifth amended complaint, the Court allowed
28 Plaintiff to file claims for both tortious and contractual breach of the implied covenant of good

1 faith and fair dealing. The Court had ruled that Plaintiff's previous complaints included a claim
2 for breach of the implied covenant of good faith and fair dealing sounding in tort, after
3 considering the type of damages Plaintiff was seeking. Therefore, the fifth amended complaint
4 contains two separate claims, but the allegations therein are identical and may still be fairly
5 considered under the motion for summary judgment. (#414). In fact, Plaintiff's opposition
6 (#456) to the motion for summary judgment (#414) considers the motion in conjunction with
7 the proposed fifth amended complaint, and Plaintiff notes that both claims contain similar prima
8 facie cases and the only difference is the type of damages available for the breach. To the
9 extent that Defendants focused their efforts on disposing of the tortious claim, the Court shall
10 grant Defendants additional opportunity to respond to the newly-added contractual claim.

11 The fifth amended complaint (#494) pleads a claim of breach of the implied covenant
12 of good faith and fair dealing against the Trustees, UMC, and/or the Medical Staff, alleging that
13 Defendants breached the spirit of the Bylaws when Plaintiff's clinical privileges were
14 suspended and/or limited without adequate notice or opportunity to be heard. Plaintiff further
15 alleges that Defendants failed to follow the Bylaws by not promptly scheduling or conducting
16 a Fair Hearing despite numerous requests by Plaintiff.

17 To succeed on a claim for breach of the covenant of good faith and fair dealing, Plaintiff
18 must show: "(1) the plaintiff and defendant were parties to an agreement; (2) the defendant
19 owed a duty of good faith to the plaintiff; (3) the defendant breached that duty by performing
20 in a manner that was unfaithful to the purpose of the contract; and (4) the plaintiff's justified
21 expectations were denied." *Parker v. Bank of America, N.A.*, No. 3:12-cv-126-RCJ-VPC, 2012
22 WL 5944882, at *6 (D. Nev. Nov. 26, 2012) (citing *Perry v. Jordan*, 900 P.2d 335, 338 (Nev.
23 1995)).

24 UMC and the Board of Trustees argue that they were not involved in the actions alleged
25 to be a violation of the covenant of good faith and fair dealing. Specifically, UMC disclaims
26 involvement in the disciplinary process, and the Board points out that it conducted appellate
27 hearings in which it reinstated Plaintiff's privileges. UMC and the Board did not participate in
28 the original MEC decision to suspend Plaintiff's privileges, and did not participate in the Fair

1 Hearing process. The Clark County Board of Commissioners acts as the Board of Trustees
2 for the limited purpose of providing appellate review of the actions of the MEC and the Fair
3 Hearing Committee under a clearly erroneous standard.

4 Plaintiff argues that UMC and the Board have respondeat superior responsibility for the
5 MEC's actions. Specifically, Plaintiff suggests that UMC and the Board have a principal-agent
6 relationship with the MEC and therefore are responsible for the actions of the MEC. Because
7 the motion predates the fifth amended complaint which includes an additional cause of action
8 for breach of the implied covenant of good faith and fair dealing, the Court shall deny the
9 motion at this time and allow UMC and the Board to file a renewed motion for summary
10 judgment addressing the causes of action contained in the fifth amended complaint.

11 **Ellerton, Bernstein, Carrison, Roberts, and the Medical and Dental Staff's Motion for**
12 **Partial Summary Judgment on Punitive Damages (#410)**

13 Defendants Ellerton, Bernstein, Carrison, Roberts, and the Medical and Dental Staff
14 request summary judgment on the punitive damages claims. Plaintiff seeks punitive damages
15 for the section 1983 claim and for breach of the implied covenant of good faith and fair dealing.
16 Because we grant absolute immunity to Defendants against section 1983 claims, we consider
17 only the request for punitive damages for breach of the implied covenant of good faith and fair
18 dealing.

19 The parties briefed this issue before the filing of the fifth amended complaint. Because
20 the inclusion of contractual and tortious breach of the covenant of good faith and fair dealing
21 claims in the fifth amended complaint impacts the arguments contained in these briefs, the
22 motion shall be denied in part with respect to the breach of implied covenant of good faith and
23 fair dealing and the parties shall be advised to re-file a motion confronting the issues as
24 currently presented.

25 **MOTION FOR ATTORNEY'S FEES (#509)**

26 On June 15, 2011, the Court entered an Order (#257) approving a stipulation in which
27 the parties agreed that Defendants would notify the NPDB to void any and all entries related
28 to or involving Plaintiff filed by UMC between the period of May 27, 2008 through June 15,

1 2011 by June 17, 2011. In a motion requesting sanctions (#356), Plaintiff claimed that after
2 having difficulty finding employment, he discovered that the initial report was never voided from
3 the NPDB system through a self query. While Defendants acted immediately after the
4 stipulated Court Order (#257), Defendants mistakenly voided only the revised report, which
5 had been issued a new and separate number, and left the original report intact. The Court
6 found that the failure to remove the remaining NPDB report was not a wilful violation of the
7 stipulated Court Order (#257), but that Plaintiff had shown, and Defendants do not dispute, that
8 Defendants had in fact failed to comply with the Order (#257). The Court rejected (#493)
9 Plaintiff's request that he be awarded sanctions in the amount of \$1,000 per day since June
10 15, 2011 on the basis of the evidence presented, but awarded Plaintiff fees associated with
11 bringing the Motion for Sanctions (#356).

12 Plaintiff again requests that the Court grant sanctions in the amount of all alleged lost
13 earnings Plaintiff suffered due to Defendants' failure to remove the NPDB report. The
14 arguments presented in favor of that issue essentially request that the Court find that
15 Defendants are in violation of section 1983 and liable for compensatory as well as emotional
16 damages, and the request for such damages shall be denied as premature.

17 Plaintiff seeks \$9,500.00 in attorney's fees associated with prevailing on the Motion for
18 Sanctions (#356). Pursuant to Local Rule 54-16, a motion for attorneys' fees must include a
19 reasonable itemization and description of the work performed, an itemization of all the costs
20 sought, and a brief summary of: (A) the results obtained and the amount involved, (B) the time
21 and labor required, (C) the novelty and difficulty of the questions involved, (D) the skill and
22 requisite to perform the legal service properly, (E) preclusion of other employment by the
23 attorney due to the acceptance of the case, (F) the customary fee, (G) whether the fee is fixed
24 or contingent, (H) the time limitations imposed by the client or the circumstances, (I) the
25 experience, reputation, and ability of the attorney(s), (J) the undesirability of the case, if any,
26 (K) the nature and length of the professional relationship with the client, and (L) awards in
27 similar cases. Nev. Loc. R. 54-16(b)(1), (2), (3)(A)-(L).

28 The local rule also requires that each motion "must be accompanied by an affidavit from

1 the attorney responsible for the billings in the case authenticating the information contained
2 in the motion and confirming that the bill has been reviewed and edited and that the fees and
3 costs charged are reasonable.” Nev. Loc. R. 54–16(c). The “[f]ailure to provide the information
4 required by LR 54–16(b) and (c) in a motion for attorneys’ fees constitutes a consent to the
5 denial of the motion.” Nev. Loc. R. 54–16(d).

6 Plaintiff’s counsel, Mr. Hafter, submitted a declaration in which he stated that the firm
7 spent 23.75 hours related to briefing the Motion for Sanctions (#356) and the Motion for Fees
8 (#509). Plaintiff asks \$400 per hour for Mr. Hafter’s time based on Mr. Hafter’s qualifications,
9 experience in the field, and the results obtained. Plaintiff cites Mr. Hafter’s experience in the
10 health care field both as a paramedic and as a field provider before going to law school, a
11 Master of Science degree in Health Sciences, his \$8.8 million jury verdict in a similar case, and
12 the declaration of Robert Meals, Esq. (#278-1) who declares that due to the complex subject
13 matter, an award of \$450 per hour, more than the request \$400, would be reasonable and
14 appropriate. That affidavit was provided in support of a request for attorney’s fees for the
15 appeal in this case, in which Mr. Hafter sought and was granted an award using a rate of \$450
16 per hour. Mr. Hafter provided an itemization of the hours spent on these motions, including
17 time corresponding with Plaintiff regarding Plaintiff’s self-query of the NPDB, preparing and
18 filing the motions and replies, and working with Plaintiff to collect information regarding any
19 financial losses allegedly attributable to Defendants’ failure to clear the NPDB report.

20 There is no dispute that this case involves specialized issues involving a physician’s
21 rights when privileges are curtailed or suspended. Mr. Hafter has demonstrated in this case,
22 and in *Williams v. UMC*, that he is knowledgeable in the field and zealous on behalf of his
23 clients. Defendants contend that Plaintiff is attributing work done on other motions to the
24 Motion for Sanctions (#356). We disagree. Plaintiff did include in his itemization hours worked
25 on “motion for order to show cause.” Based on the dates and the description of that work, it
26 is clear that Plaintiff is referring to the appropriate motions and not seeking to receive fees for
27 hours worked on separate matters. Defendants also contend that an hourly rate of \$400 is not
28 customary in Nevada. As support, Defendants provide an affidavit from Kim Mandelbaum,

1 Esq. stating that Defendants' primary attorney has been practicing in Nevada for over 24 years
2 and almost exclusively in this area of law and is being paid \$150 per hour. Defendants also
3 contend that Plaintiff's former counsel represented previously that his billable rate was \$165
4 per hour.

5 While the Court finds that Plaintiff's counsel did not mis-attribute work done on other
6 matters in claiming 23.75 hours' worth of work, the Court finds that the \$400 billable rate is not
7 reasonable here. The fees sought here are specifically related to Defendants' failure to
8 remove NPDB reports, and do not involve the highly specialized expertise Mr. Hafter claims
9 entitles him to an hourly rate of \$400. While the Court previously ordered that fees shall be
10 awarded as it was Defendants' mistake that prompted the work involved in bringing the Motion
11 for Sanctions (#356) and the Motion for Attorney's Fees (#509), the fees were not awarded as
12 a sanction against any type of intentional or wilful misbehavior. The fees are meant to
13 compensate Plaintiff for additional legal fees that were incurred as a result of Defendants'
14 failure to remove the NPDB report. In addition, we note that there is some dispute over
15 whether Plaintiff might have avoided fees altogether simply by working with Defendants and
16 alerting them to the remaining report, rather than filing motions with the Court. For that reason,
17 the Court shall reduce Plaintiff's requested hourly billing rate to \$300, still well above the rates
18 that Defendants claim is customary in the area. Attorney's fees shall, therefore, be awarded
19 in the amount of \$7,125.00.

20 CONCLUSION

21 For the foregoing reasons, IT IS ORDERED that the Motion for Partial Summary
22 Judgment on Plaintiff's Breach of the Implied Covenant of Good Faith and Fair Dealing claim
23 against Defendant The Medical and Dental Staff (#409) is **DENIED**.

24 IT IS FURTHER ORDERED that the Motion for Partial Summary Judgment on Plaintiff's
25 Punitive Damages Claim (#410) is **GRANTED** with respect to punitive damages under section
26 1983 and **DENIED** with respect to punitive damages for breach of the covenant of good faith
27 and fair dealing. Plaintiff's Request for Order Allowing the Filing of an Overlength Brief (#446)
28 is **GRANTED**. Plaintiff's Request to Strike Exhibits (#468) is **DENIED** as the Court has

1 previously ruled that the exhibits are not new evidence.

2 IT IS FURTHER ORDERED that the Motions for Summary Judgment (##414, 417) are
3 **DENIED**. Plaintiff's Request for Order Allowing the Filing of an Overlength Brief (#457) is
4 **GRANTED**.

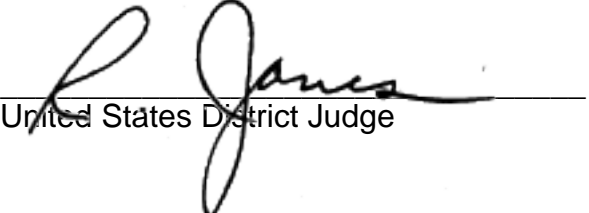
5 IT IS FURTHER ORDERED that the Motion for Summary Judgment (#478) is
6 **GRANTED**. Plaintiff's claims under section 1983 are dismissed.

7 IT IS FURTHER ORDERED that the Motion for Attorney's Fees (#509) is **GRANTED**
8 **IN PART AND DENIED IN PART**. Plaintiff shall be awarded \$7,125.00 in fees.

9 IT IS FURTHER ORDERED that the Motions to Dismiss (##510, 545) are **GRANTED**
10 with respect to any claims under section 1983 and **DENIED** with respect to any remaining
11 claims. Plaintiff's Motion For Leave to File Excess Pages (#559) is **GRANTED**.

12 The parties may file additional motions in accordance with this Order within twenty-eight
13 (28) days.

14 Dated this 21st day of June, 2013.

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17 United States District Judge
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